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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-317

ANNE R. SWORDS, as Administratrix of the Estate of Robert L. Swords,
Petitioner,

v.

AMERICAN SEALANES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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v.

AMERICAN SEALANES, INC.,

Respondent.

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The petitioner Anne R. Swords, administratrix of the estate of Robert S. Swords, deceased, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on June 4, 1971.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Eastern District of Virginia.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on June 4, 1971. A timely petition for rehearing *en banc* was denied on July 2, 1971. (See p. 12a of Appendix hereto.) This petition for certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

Whether a jury may infer a causal relationship between evidence of an unseaworthy chain and stanchion guard rail and the unwitnessed death of a seaman overboard in a case arising under the death of the High Seas Act, 46 U.S.C. § 761 *et seq.*, and the Jones Act, 46 U.S.C. §§ 688 *et. seq.*

STATUTORY PROVISIONS INVOLVED

United States Code, Title 46:

§ 688, *Recovery for injury or death to seaman*

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

§ 761. *Right of action; where and by whom brought*

> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Terri-

tories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

United States Code, Title 45:

§ 51. *Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees*

Every common carrier by railroad while engaging in commerce between any of the several States or Territories or between any of the States and Territories or between the District of Columbia and any of the States or Territories or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in demages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of the next of kin dependent upon such employee for such injury or death resulting in whole or part from the negligence of any of the officers, agents, or employees of such carrier or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Every employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such com-

merce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

STATEMENT OF CASE

This is a suit brought by Anne R. Swords, widow and administratrix of the estate of Robert L. Swords, a merchant seaman, who on February 25, 1969, disappeared from the respondent's vessel, the SS AMERICAN PRIDE, and whose body was later discovered in the China Sea. This jurisdiction of the district court was invoked under the Jones Act, 46 U.S.C. § 688, and the Death on the High Seas Act, 46 U.S.C. § 761, because the deceased was a merchant seaman and the accident occurred more than a marine league from the United States.

In February, 1969, and several days prior to Sword's death, the SS AMERICAN PRIDE had been in Okinawa, where the decedent had gone ashore with some shipmates and had been drinking heavily (R. 49, 50). When he returned to the vessel, he carried several bottles of whiskey on board with him and was seen drinking on the ship (R. 50, 51). Swords was unable to stand his watches the first two days after the ship left Okinawa; but on February 25, he decided that he would stand his regular four to eight watch in the morning even though he was said to have appeared still shaky and "sick" in the mess hall before going to his station. (Deposition of James R. Boggs at 7; R. 54, 55). There was no testimony that he was seen alive after leaving the mess hall to go to his watch station in the bow of the ship.

In this wrongful death action, Mrs. Swords alleged that the captain of the ship had been negligent in allowing the decedent to stand watch in his deteriorated condition and in conducting an improper search. These negligence claims were based on the Jones Act which makes the provisions of the Federal Employers' Liability Act applicable to merchant seamen and provides a civil action with the right to a jury trial for the wrongful death of a seaman due to negligence. Mrs. Swords also alleged that her husband's death was caused by the ship's unseaworthiness. The evidence showed that some 30 feet from the bow, where the deceased's watch station was located, there was a 30-foot-long chain and stanchion guard rail on each side of the ship. On the starboard side two or three of the stanchions or upright posts had rusted through, causing the chain rail to sag and hang loose about a foot to 16 inches above the deck, rather than at its normal height of 36 to 41 inches. Deposition of James R. Boggs at 8-10. The plaintiff's unseaworthiness claim was based on the Death on the High Seas Act which provides a wrongful death action in admiralty in a federal district court for a death caused by unseaworthiness. Because the negligence and unseaworthiness claims were tried together in the United States District Court for the Eastern District of Virginia, four issues were submitted to a jury, who returned a general verdict for the plaintiff and set damages at $120,000. On August 21, 1970, judgment in accordance with the verdict was entered by the district court. (See p. 1a of Appendix hereto.)

The Court of Appeals for the Fourth Circuit reversed the judgment and remanded the case for a new trial. The court said that, although the questions of negligence were properly submitted to the jury, there was not sufficient evidence to support a finding that the admittedly unseaworthy condition of the guard rail proximately caused the

decedent's death. Since the verdict was general in nature, the Court of Appeals ordered a new trial on the issue of negligence. (See p. 2a of Appendix hereto).

REASONS FOR GRANTING WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEAL THAT A JURY MAY INFER THAT A SEAMAN'S UNWITNESSED DEATH WAS PROXIMATELY CAUSED BY A BREACH OF HIS EMPLOYER'S DUTY TO PROVIDE A SAFE PLACE TO WORK.

The court below relied on the language in *Chicago, Milwaukee and St. Paul Ry. Co. v. Coogan,* 271 U.S. 472 (1926), in holding that the record left the matter of proximate cause "in the realm of speculation and conjecture." (See p. 5a of Appendix hereto). That case, brought under the FELA, involved the unwitnessed death of a railroad brakeman, who was run over by a train and whose survivors had claimed that the accident was caused by a loosened air pipe line near the tracks, under which the decedent had caught his foot. The court used the above-quoted language in holding that the evidence was not sufficient to support a finding by the jury that the loose pipe was a cause of the accident.

In direct conflict with these decisions is the reasoning of this court in *Lavender v. Kurn,* 327 U.S. 645 (1946), decided twenty years after *Coogan* on very similar facts. The decedent was a switchtender in a railroad yard and was found dead a few feet from a track on which he had been working. The plaintiff's theory of recovery in that case was that the death was caused by a negligently maintained work area. Because of the high and uneven ground

on which the decedent had been standing, he could have been struck on the head by a swinging mail hook on a passing train. This Court held that the inference that the decedent was killed by the mail hook because of the uneven ground was not "so unreasonable as to warrant taking the case from the jury." 327 U.S. at 652. Even though there was some evidence that the decedent had been murdered, the Court said that the jury was free to disregard whatever facts were inconsistent with its conclusion, and that it would be an invasion of the jury's function for the factual disputes involving conflicting evidence to be relitigated by a reviewing court. The court approved the submission of the case to the jury with language directly contrary to that used in *Coogan* and the present case:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where as here there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion." 327 U.S. at 653.

In *Schulz v. Pennsylvania Ry. Co.*, 350 U.S. 523 (1956), a tubgoat fireman was found in the water several weeks after his disappearance on a night when he had been assigned to work on four tugboats docked side by side. In the ensuing action for wrongful death under the Jones Act, there was evidence that the tug owner had negligently

required the decedent to work on the unlighted, icy and undermanned boats. Nevertheless the district court and the court of appeals did not allow the jury to consider whether such negligence was a cause of the accident. This court reversed:

> "Fair-minded men could certainly find from the foregoing facts that defendant was negligent in requiring Schulz to work on these dark, icy and undermanned boats. And reasonable men could also find from the discovery of Schulz's half-robed body with a flashlight gripped in his hand that he slipped from an unlighted tug as he groped about in the darkness attempting to perform his duties. But the courts below took the case from the jury because of a possibility that Schulz might have fallen from the one boat that was partially illuminated by shore lights. Doubtless the jury could have so found (had the court allowed it to perform its function) but it would not have been compelled to draw such inferences. For 'The very essence of its function is to select from among conflicting inferences and conclusions which it considers most reasonable.'" [citation omitted]. 350 U.S. at 526.

In the present case the fourth circuit said *Schulz* was not contrary precedent because of "the vast difference in its circumstances." (See p. 5a Appendix hereto) However, the only significant difference is the type of unsafe condition from which the cause of the accident could be inferred. The conclusion that an unwitnessed accident was caused by a slippery deck is no more obvious than an inference that an unwitnessed drowning was caused by a defective guardrail.

Also controlling in the present case is *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500 (1957) wherein this Court held that,

> "Judicial appraisal of the proofs to determine whether a jury question is presental is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death." 352 U.S. at 506.

In *Harris v. Whiteman,* 243 F. 2d 563 (5th Cir. 1957), *rev'd per curiam sub nom., Butler v. Whiteman,* 356 U.S. 271 (1957), the decedent, a laborer who had been working on board a ship, fell overboard and drowned. There were no eyewitnesses to the accident. In a wrongful death action under the Jones Act, the decedent's widow asserted that the accident was caused by the employer's negligent failure to provide a gangplank between the ship and a floating barge which had been made fast to it. Since there was not enough space between the barge and the ship for a man to slip into the water, both the district court and the court of appeals ruled that there was insufficient evidence for the jury to consider negligence as a cause of the drowning. But this court reversed *per curiam,* holding that there was an evidentiary basis for jury findings as to whether or not the employer's negligence played a part in causing the death.

The evidence with regard to causation in *Whiteman* was no more than what was shown by petitioner in the present case. There was merely a showing of a condition which the jury could infer was a cause of the accident. Since there were no eyewitnesses in *Whiteman,* the jury would be permitted to speculate that the drowning was connected with passage between the ship and the barge. However, the Fourth Circuit refused to allow such freedom

to the jury in the present case, where the decedent was last seen going to his lookout station in the proximity of the defective guard rail.

The Fourth Circuit's refusal to accept a jury determination of causation in this case is contrary to the holding in *Pollard v. Seas Shipping Co., Inc.,* 146 F. 2d 875 (2d. Cir 1945). This case, brought under the Jones Act, also involved the death by drowning of a seaman. The plaintiff introduced evidence that a catwalk near the side of the ship was broken and dangerous and on the night of the accident there was a crash, a cry, and a splash, the cry being identified as the decedent's. The court held that the jury could consider whether the shipowner's negligence in constructing the dangerous catwalk had caused the decedent to fall overboard. Although there was no direct evidence that the decedent was on the catwalk, the court ruled that the plaintiff had shown enough to permit an inference by the jury that the decedent had fallen through the defective broken railing:

> "The composite picture of plaintiff's evidence . . . was that the catwalk was close to the side of the vessel; that it was broken and dangerous; and that on the night in question there was a crash, cry, and splash, the cry being identified as Pollard's. This testimony was contradicted by defendant's witnesses, who said that the catwalk was all right, reasonably safe, and placed well inboard, so that had Pollard gone through the railing, he would not have gone overboard. But it seems apparent that plaintiff has shown enough to permit an inference by jury that defendant's negligence in constructing a dangerous catwalk had caused Pollard to fall through the railing and overboard . . . The case was undoubtedly close on the issue of negligence as a proximate cause of the death; but that does

not justify either the District Court or us in usurping the function of the jury." 146 F. 2d at 877.

A jury could find that the defective railing had nothing to do with the fall overboard, but it was up to the jury to determine the matter one way or the other. The Fourth Circuit's decision in the present case taking the unseaworthiness issue away from the jury drastically reduced the scope of the jury role directly contrary to its protection by the Second Circuit in *Pollard*.

The Circuit Court cited *Sadler v. Pennsylvania R. Co.*, 159 F. 2d 784 (4th Cir. 1947) as "conclusive instantly" to the present case, saying, that in *Sadler*:

> A cook on the defendant's barge drowned at night. At the time, the barge was tied to a pier alongside another barge owned by the same defendant. 'There was evidence that the guard rails surrounding [the barge] were rotten and broken in places' and were inadequately lighted, at 785. The theory of the plaintiff was that the decedent, in crossing from barge to barge, the boats having drifted almost together, had fallen into the water because, among other things, 'of the defective condition of the guard rails', Id. The Court declared that this evidence was not sufficient 'to take the case to the jury,' at 786. Swords' case is no stronger." (See p. 6a, Appendix hereto)

But as Judge Butzner correctly stated in his dissenting opinion,

> "*Sadler* vs. *Pennsylvania R.R. Co.*, 159 F. 2d 784 (4th Cir. 1947), is not to the contrary, for there we were concerned only with negligence, not causation. Without elaborating, we held that 'the evidence of

negligence with respect . . . to the condition of the guardrails' was insufficient to take the case to the jury. 159 F. 2d at 786. But as to the cause of drowning, we said:

> "There is nothing to indicate that he was shoved or pushed overboard, or that he was intoxicated, or that he was attempting to commit suicide. Under such circumstances the cause of the fall can no more be said to be speculative than in the case of a man found in the hold of a vessel beneath an unguarded hatch. See *Johnson v. Griffiths S.S. Co.*, 9 Cir., 150 F. 2d 224. It is the duty of the vessel to provide a safe working place for members of its crew; and where there is evidence that it failed to do so and proof of circumstances from which it can reasonably be inferred that injury resulted from such failure, the cause is for the jury. It is elementary that proximate cause need not be established by direct evidence but may be proven by circumstances.' 159 F. 2d at 784.

(See p. 8a Appendix hereto.)

In *Davis v. Parkhill - Goodloe Co.*, 302 F. 2d 489 (5th Cir. 1962), the parents of a drowned seaman sought damages under the Jones Act for this unwitnessed death. The decedent was employed aboard a dredge and was last seen alive walking toward shore on a drainage pipe which was equipped with walkway planks for this purpose. The plaintiff's theory was that the shipowner was negligent in not requiring its inexperienced employees to wear life vests and that such negligence was a proximate cause of the decedent's death. The district court, acting as trier of fact, found that no negligence of the shipowner, either actual or assumed, proximately caused the seaman's death. The court of appeals reversed, holding that the trial judge

was required to make a finding of negligence as a matter of law for the failure adequately to instruct the seaman on the use of life preservers. The court could not assume that, had the trial judge made that finding, "he would have adhered to his arguendo assumption of no proximate cause." 302 F. 2d at 494. The trial judge as the trier of fact would have been able to infer that the absence of a life vest was a cause of the decedent's death.

The present case also conflicts in principle with the decisions of other circuits allowing an inference that the proximate cause of an otherwise unexplained sinking of a ship was unseaworthiness. In *Admiral Towing Co. v. Woolen*, 290 F. 2d 641 (9th Cir. 1961), a tugboat, manned only by her master and an inexperienced seventeen-year-old boy, disappeared at sea. There was evidence that the crew of the ship was inadequate and that this condition amounted to unseaworthiness and negligence. The court rejected the shipowner's contention that the evidence was insufficient to show that negligence or unseaworthiness proximately caused the loss of the tug and the deaths of the crew:

> "Since nothing has been heard from, of, or about the vessel or her crew since she set out from San Francisco in July, 1957, no direct evidence of the cause of her disappearance appears in the recrod. However, in wrongful death actions sounding in negligence under the Jones Act, 46 U.S. Ct. § 688, the Federal Employers' Liability Act, 45 U.S.C.A. § 51 *et seq.* (adopted by reference and made part of the Jones Act), and the Death on the High Seas Act, 46 U.S.C.A. § 761, or sounding in unseaworthiness under general maritime law, when the exact circumstances of the casualty are unknown, the United States Supreme Court has fundamentally transformed

traditional negligence law respecting causation by permitting the finder of fact to supply by inference many of the elements normally required to be proven by the plaintiff or claimant.

Thus, an accident may be infered from the fact of disappearance; and the "where" and "when" of the accident need not be fixed exactly. *Schulz* v. *Pennsylvania Ry. Co.*, 1956, 350 U.S. 523, 76 S. Ct. 608, 100 L. Ed 688; *Roth* v. *Bird,* 5 Cir., 239 F. 2d 257; *Lavender* v. *Kurn*, 1946, 327 U.S. 645, 66 S. Ct. 740, 90 L. Ed. 916 . . .

As to "how" or "why" the accident occurred, considerable "speculation" is permitted. The trier of fact must be afforded substantial latitude in making this determination even though the evidence supporting it is slight and even though the reviewing court might have arrived at a different conclusion. *Schulz v. Pennsylvania Ry. Co., supra* . . ." 290 F.2d at 649, 650.

The court referred to *Roth* v. *Bird, supra,* a similar case in which the overloading of a ship was inferred to be the cause of its disappearance:

"As in the instant case, the court's conclusion on the question of legal cause might be described as "conjectural." Here, too, the casualty might have resulted from causes having nothing to do with the overloading, such as an explosion, negligent steering onto rocks or shores, or an abnormal swell. However, there the court relied, as we do here, on the permissible inference, akin to *res ipso loquitur,* that the requisite legal cause may be found from evidence of negligence and/or unseaworthiness on the one hand and disappearance of the vessel on the other." 290 F. 2d at 651.

The Cleveco, 154 F.2d 605 (6th Cir. 1946), involved the sinking of a tugboat on Lake Erie. There was evidence that the tug was unseaworthy because she was topheavy and unstable; however, since no one aboard the ship survived, there was no direct evidence of the cause of the sinking and the subsequent deaths of the crew. The Sixth Circuit held that the

> "Inferences and conclusions of the trial court that the sinking of the tug resulted from her lack of stability and the fact that she was unseaworthy, were reasonably and properly drawn, and are amply sustained by the evidence." 154 F.2d at 615.

2. THE DECISION BELOW RAISES A RECURRING PROBLEM REGARDING THE EVIDENCE SUFFICINT TO SHOW PROXIMATE CAUSE IN AN UNWITNESSED DEATH AT SEA.

As the above cited cases demonstrate, there is likely to be a challenge to the sufficiency of a showing by a seaman's survivors that his unwitnessed death was proximately caused by unseaworthiness or negligence. Especially in the instance of a man lost overboard, it is all but impossible to show more than the existence of an unsafe condition aboard the ship which could reasonably have been a cause of the accident. This Court has been protective of the fact finding role of the jury and has approved inferences of causation in cases of unwitnessed accidents involving railroad workers and seamen, who do not have the benefit of coverage under the workmen's compensation statues. The recurrent necessity to determine the sufficiency of the evidence in such cases could

be alleviated by a decision directed at the elements required to be proved to justify an inference of causation in unwitnessed death cases such as the present one.

Although the respondent's liability based on the defective stanchions in the present case was tried under a theory of unseaworthiness rather than the Jones Act criterion of negligence, the dissenting judge below pointed out that the proximate cause test on the unseaworthiness issue was the same as for negligence under the Jones Act (See p. 7a of Appendix hereto). Furthermore, the majority of the Fourth Circuit implicitly agreed that the causation issue should be treated the same in both unseaworthiness and negligence cases since they based their opinion on F.E.L.A. and Jones Act cases. Furthermore, in *Admiral Towing Co.* v. *Woolen, supra,* and *Roth* v. *Bird, supra,* the inference of proximate cause was said to be permissible with regard to unseaworthiness as well as negligence. Moreover, *The Cleveco, supra,* was founded entirely on an unseaworthines theory. By addressing itself to the inferences a jury may properly draw in the present case, this court can clarify the comparative burdens of proof in unseaworthiness and Jones Act cases as well as defining the elements of unwitnessed death cases generally.

CONCLUSION

For these reasons a writ of certiorari should issue review the judgment and opinion of the Fourth Circuit.

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APPENDIX

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

ANNE R. SWORDS, as Administratrix of
the Estate of Robert L. Swards, Deceased,

v.

AMERICAN SEALANES, INC.

CIVIL ACTION
NO. 389-69-N

JUDGMENT

This action came on for trial before the Court and a jury, Honorable John A. MacKenzie, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that the plaintiff, Anne R. Swords, as Administratrix of the Estate of Robert L. Swords, Deceased, recover of the defendant, American Sealanes, Inc., the sum of $100,000.00, with interest at the rate as provided by law and costs of action.

Dated at Norfolk, Virginia, this 21st day of August, 1970.

W. FARLEY POWERS, JR.
Clerk of Court

By /s/ Dorothy K. Johnson
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15,155

Anne R. Swards, as Administratrix of the Estate of Robert L. Swords, Deceased,

Appellee,

v.

American Sealanes, Inc.,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk.

John A. MacKenzie, District Judge.

(Argued March 5, 1971 Decided June 4, 1971)

Before Boreman, Bryan and Butzner, Circuit Judges.

Charles F. Tucker (J. Davis Reed, III, and Vandeventer, Black, Meredith and Martin on brief) for Appellant, and C. Arthur Rutter, Jr., (Stuart V. Carter, and Briet, Rutter, Cohen, Ermlich, and Friedman on brief) for Appellee.

Albert V. Bryan, Circuit Judge:

Pleading unseaworthiness of the SS American Pride and her master's negligence, crewman Robert L. Swords' administratrix declared against the shipowner, American Sealanes, Inc., fer death damages under the Jones Act, 46 USC 688. Swords had drowned February 25, 1969, in the

China Sea. A general verdict on the two counts went for the plaintiff in the amount of $100,000.00. The vessel's owner now asks for a new trial, and we grant it.

Appellant protests the failure of the facts as a matter of law to support either cause of action. The testimony was without discord and revealed the following episode. With Swords aboard as an able-bodied seaman, the American Pride left Okinawa on Sunday, February 23, 1969, bound for Sasebo, Japan. Swords had been drinking heavily during the several days the ship was in port, and was still inebriated when he rejoined the vessel just before she set sail. He was observed carrying whiskey aboard and indulging on ship.

Apparently because of his intemperance, he did not stand evening watch on Sunday, nor on Monday. The first he stood after departing Okinawa was Tuesday, February 25.

That morning he was called for the 4 to 6 watch at 3:30 o'clock, when he was seen sitting on the side of his bunk. Shortly thereafter Swords was observed in the messroom drinking coffee. To the shipmate who had called him, he seemed sick. He was asked "if he felt like standing watch and he said yes, he would try it." Later, when this same witness saw him in the mess he "looked a little sick, but he was up." His hand shook as he drank the coffee.

About 4 A.M. Swords sought the baker in the galley "to go to work", apparently meaning to make him coffee. Swords spoke of the latter's gaming loss of $30, commenting that it was "not too bad". The baker thought he "looked like he did every morning". Acknowledging the baker's caution to dress in heavy clothes because of the cold outside, he replied, "I am, don't worry," and left for his watch.

That was the last seen of him. He was not authorized to leave his watch station in the starboard bow of the ship unless relieved by a standby. His flashlight and gloves were later found in the seat provided for him.

Along the edge of the deck at this location was a solid metal bulwark about 4 feet in height running from the bow sternward for approximately 30 feet. Adjoining and extending aft for another 30 feet was a guardrail some 3 feet high composed of 3 horizontal chains supported by upright stanchions set into the deck. There was, however, a defect in this guardrail caused by one or more dislocated stanchions which had become separated from the deck. This allowed the chains to dip at one spot to an estimated height of 16 inches above the deck. The passageway bordered by the railing was 8 feet wide, with the deck sloping gradually seaward.

The unsea..orthines alleged by the plaintiff is laid to the sagging railing. The contention is that Swords fell over the side because of this break in the protection.

Report of Swords' disappearance was sent to the bridge at about 6:35 A.M., February 25. A thorough search of the ship followed. Beginning at 7 A.M. the vessel retraced her course several times, scouring the sea for Swords until 3 o'clock in the afternoon. An urgency message of a man overboard had been radioed at 7:38 A.M. to the ships in the area and to Japan's Coast Guard. Swords' body was found in the water by the Japanese several weeks later.

From these facts negligence also is imputed to the shipowner. First, it is said that the master was negligent in allowing Swrods to go on watch in the deteriorated physical condition due to his dissipation. It is charged in ad-

dition that the master was neglectful in not broadcasting the tragedy earlier, and in failing to post a lookout on the mast during the search for the seaman.

I. Guided by the prescriptions of *Chicago, Milwaukee & St. Paul Railway Company* v. *Coogan*, 271 U.S. 472 (1926), our judgment is that when the facts, and the conclusions which a jury might fairly draw from them, are taken most strongly against the shipowner, the plaintiff's contention that the slack in the chain accounted for or contributed to Swords' death is "without any substantial support. The record leaves the matter in the realm of speculation and conjecture", at 478. This is not enough to justify submission of the issue of causative unseaworthines to the jury.

Because of the vast difference in its circumstances, *Schultz* v. *Pennsylvania R. Co.*, 50 U.S. 523 (1956), cited to us, is not actually precedent contra. There the decedent had been required to tend, on a bitter cold night, four tugboats docked side by side. Three were unlighted and one only slightly illuminated, although their decks were partly iced. His body was found several weeks later in the water near the boats. The Court pointed to the fair inference that these conditions proximately caused the accident and that the defendant was derelict in requiring the decedent to work in such conditions. Therefore, it refused direction of a verdict for the defendant.

Likewise, *Lavender* v. *Kurn*, 327 U.S. 645 (1946), rested on facts fully giving rise to an inference of proximite cause. The body of the switch-tender, for whose death the action was brought, was found near the railroad tracks. The proof was that his duties required him to traverse the rails at intervals, with his safety imperilled by train movements. No one witnessed his death, but this testi-

mony was held to supply a premise for the inference that carelessness in the railway activity was the proximate cause of the accident. No such threatening hazard is shown as joining Swords' demise and the lowered railing.

Closer to the present issue is *Mosely v. Cia. Mar. Adra. S.A.* 314 F. 2d 223, 227 (2 Cir. 1963). The Court found that the question of the ship's negligence in failing to provide a longshoreman with a safe place to stand was properly submitted to the jury. However, the Court declined to sustain a submission to the jury of unseaworthiness based upon a defective cargo hook. While explaining that faulty equipment may constitute unseaworthiness, the Court noted the absence of any proof that the condition or fitness of the hook caused or contributed to the plaintiff's injury.

On the same theory, a directed verdict for the defendant was affirmed in *Miller* v. *Farrell Lines, Inc.*, 247 F. 2d 503, 506 (2 Cir. 1957), where suit had been brought to recover damages under the Jones Act for the loss of decedent overboard. The Court found that the plaintiff failed to introduce evidence of any probative facts to demonstrate that defendant's negligence proximately occasioned the loss of life. Therefore, submission to the jury would have been an invitation for indulgence in a series of legally improper speculations.

Conclusive instantly is our decision in *Sadler* v. *Pennsylvania R. Co.*, 159 F. 2d 784 (4 Cir. 1947). A cook on the defendant's barge drowned at night. At the time, the barge was tied to a pier alongside another barge owned by the same defendant. "There was evidence that the guard rails surrounding (the barge) were rotten and broken in places" and were inadequately lighted, at 785. The theory of the plaintiff was that the decedent, in crossing from barge to barge, the boats having drifted

almost together, had fallen into the water because, among other things, "of the defective condition of the guard rails," Id. The Court declared that this evidence was not sufficient "to take the case to the pury," at 786. Swords' case is no stronger.

II. On the other hand, we think the evidence was sufficient to permit the jury to consider the charges of negligence previously enumerated and find for the plaintiff. However, since there was a general verdict on the two counts, it is not possible to say on which the jury found its verdict. If on unseaworthiness, it cannot stand, if on negligence, it can. Consequently, we must order a new trial in the case of the issue of negligence. See *Mosley* v. *Cia. Mar. Adra, S.A., supra,* 314 F2d 223,229 (2 Cir. 1963); *Vandercook and Son, Inc.* v. *Thorpe,* 344 F2d 930, 931 (5 Cir. 1965).

Reversed and remanded.

Butzner, Circuit Judge, dissenting:

I believe the district judge properly denied the shipowner's motion to set aside the verdict for the plaintiff. At a point not more than twenty steps away from Swords' station, the guardrail of the ship admittedly was defective, a condition which would warrant a jury in finding unseaworthiness. More important, on the question of causation the evidence showed that the chains sagged to 16 inches above the deck — less than the height of a man's knee. Such an obstacle could easily trip a seaman stirring about his station to keep alert on a dark, cold night. The scope of our review, as stated in *Rogers* v. *Missouri,* 352 U.S. 500, 506 (1957), "is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death." Though here we deal with

unseaworthiness instead of negligence, our inquiry may go no further than whether the jury could conclude with reason that the defective guardrail played any part at all in Swords' falling overboard. The cause of death under circumstances no less bizarre has been held a jury issue in both Jones Act cases, see e.g., *Pollard* v. *Seas Shipping Co., Inc.,* 146 F 2d 875 (2d Cir. 1945), and FELA cases, see e.g., Lavender v. Kurn, 327 U.S. 645 (1946).

Sadler v. *Pennsylvania R.R. Co.,* 159 F. 2d 784 (4th Cir. 1947), is not to the contrary, for there we were concerned only with negligence, not causation. Without elaborating, we held that "the evidence of negligence with respect . . . to the condition of the guardrails" was insuffiicent to take the case to the jury. 1959 F.2d at 786. But as to the cause of drowning, we said:

> "There is nothing to indicate that he was shoved or pushed overboard, or that he was intoxicated, or that he was attempting to commit suicide. Under such circumstances the cause of the fall can no more be said to be speculative than in the case of a man found in the hold of a vessel beneath an unguarded hatch. See *Johnson* v. *Griffiths S. S. Co.,* 9 Cir., 150 F.2d 224. It is the duty of the vessel to provide a safe working place for members of its crew; and where there is evidence that it failed to do so and proof of circumstances from which it can reasonably be inferred that injury resulted from such failure, the case is for the jury. It is elementary that proximate cause need not be established by direct evidence but may be proven by circumstances." 159 F.2d at 784.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15,155

Anne R. Swards, as Administratrix
of the Estate of Robert L. Swords,
Deceased,

Appellee,

v.

American Sealanes, Inc.,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk.
John A. MacKenzie, Disrict Judge.

PETITION FOR REHEARING IN BANC

I.

The court misapprehended the importance of this Court's earlier decision in *Sadler* v. *Pennsylvania R. Co.*, 159 F.2d 784 (4th Cir. 1947).

In *Sadler* the Court stated at Page 786 that there was insufficient evidence "as to the condition of the (allegedly rotten and broken) guard rails" to "take the case to the jury," but that "proximate cause need not be established by direct evidence but may be proven by circumstances", and since there was evidence of defective lighting "from which it can reasonably be inferred that injury resulted . . . the case is for the jury."

The decision then is not contrary to the present case but supports the trial court's submittal of the issue to the

jury. In *Swords* we have an admittedly unseaworthy condition and are concerned *solely* with causation which *Sadler* says is a jury question.

II.

The court's reliance upon *Chicago, Milwaukee and St. Paul Ry. Co.* v. *Coogan,* (1926), 271 U.S. 472, 46 S. Ct. 564, is misplaced, that case having been greatly modified by *Lavender* v. *Kurn,* (1946), 327 U.S. 645, 66 S. Ct. 740.

The latter case stated that, "Whenever . . . the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required" by the jury. Error appears only in the "complete absence of probative facts to support the conclusion". It is "immaterial that the (appellate) court might draw a contrary inference."

III.

The court distinguished *Schultz* v. *Pennsylvania R. Co.*, (1956), 350 U.S. 523, 76 S. Ct. 608, on the facts when the facts are indistinguishable.

Schultz is directly on point. In both cases the weather was cold, the only illumination the decedent had was a flashlight, and both men had to work in unsafe areas. The only real factual difference in the cases was that there was ice on the deck in *Schultz* and a sagging chain rail in *Swords*. *Schultz* is, therefore, controlling.

IV.

The court misinterpreted the *Mosley* v. *Cia. Mar. Adra, S. A.*, 314 F.2d 223, 227 (2 Cir. 1963).

The present opinion says, at page 7, quoting *Mosley*, that "the Court declined to sustain a submission to the

[illegible] unseaworthiness based upon a defective cargo hook. While explaining that faulty equipment may constitute unseaworthiness, the Court noted the absence of any proof that the condition or fitness of the hook caused or contributed to the plaintiff's injury." The majority opinion misunderstood the decision. In fact the Court held that "Mahnich failed to put in any proof that the hook was in any way unfit or unsuited for its intended use." "The mere fact that an accident occurs . . . cannot, without more, establish that a vessel is unseaworthy." pp. 104-105. Thus *Mahnich* was decided on the total lack of evidence of an unseaworthy hook. The question of causation never became important. In *Swanson* unseaworthiness was admitted and the *sole* issue was causation.

Wherefore, upon the foregoing grounds, it is respectfully urged that this petition for rehearing be granted and that the judgment of the District Court be, upon further consideration, affirmed.

Attorney for Petitioner
and Plaintiff-Appellee
STUART V. CARTER.

CERTIFICATE OF COUNSEL

I, Stuart V. Carter, attorney for petitioner and plaintiff-appellee, do hereby certify that the foregoing petition for a rehearing in this cause is presented in good faith and not for purpose of delay.

Stuart V. Carter

[illegible]
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UNITED STATES COURT OF APPEALS
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Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. John A. MacKenzie, District Judge.

ORDER DENYING PETITION FOR REHEARING

Upon consideration of the petition of the Appellee for rehearing en banc, no judge in rgeular active service or a member of the panel that rendered the decision in this case having suggested that the case be heard or reheard en banc, and the said panel being of the opinion that the said petition is without merit, it is

ORDERED that the said petition be, and it is hereby, denied.

/s/ HERBERT S. BOREMAN
United States Circuit Judge

/s/ ALBERT V. BRYAN
United States Circuit Judge

I dissent:

/s/ JOHN D. BUTZNER, JR.
United States Circuit Judge